* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Date of Decision : February 02, 2015*

\+ **LPA 658/2014**

KAILASH CHAND ..... Appellant

Represented by: Mr.Anuj Aggarwal, Advocate with Ms.Divya Aggarwal, Advocate

versus

DTC ..... Respondent

Represented by: Mr.Sarfaraz Khan, Advocate

CORAM:
HON'BLE MR. JUSTICE PRADEEP NANDRAJOG
HON'BLE MS.JUSTICE PRATIBHA RANI

PRADEEP NANDRAJOG, J.

1. On October 16, 1984 the appellant was appointed as a Conductor with the respondent and was to be on probation for a period of one year. Deployed as a Conductor with a bus plying on Route No.402 between Jama Masjid and Okhla, the checking staff claims to have detected on February 29, 1985 that a passenger had been sold a used ticket by the appellant and he was in possession of another used ticket. Empowered under Regulation 9(a)(I) of the DRTA (Conditions of Appointment and Service) Regulations, 1952, since the appellant was still under probation his services were terminated on August 23, 1985 by an order which is ex-facie non stigmatic inasmuch as it does not contain the reason for the services of the appellant to be terminated.

2. It is an admitted case of the parties that no inquiry whatsoever was held.

3. Seeking a reference for the dispute concerning his services being terminated to be referred to an Industrial Tribunal, and on a reference being made, vide award dated January 11, 1999, the Industrial Tribunal opined that since the termination was founded on an alleged misdemeanour, it was penal in nature. The order of termination was set aside and a direction was issued that the appellant be reinstated in service with full back wages.

4. Vide impugned order dated July 19, 2012 W.P.(C) No.3841/2000 filed by the respondent challenging the award has been allowed. The reason given by the learned Single Judge is that since the appellant was a probationer when his services were terminated, there was no violation of the law.

5. During hearing of the appeal, it was urged by learned counsel for the appellant that the termination being based upon alleged corrupt practices of the appellant was punitive and hence without issuing a charge-memo and holding an inquiry the services of the appellant could not be terminated. It was urged that the termination being stigmatic i.e. labeling the appellant as a corrupt person required a disciplinary inquiry to be held after issuing a show cause notice to the appellant and giving him an opportunity to defend himself.

6. Per contra, it was argued by learned counsel appearing for the respondents that the order passed by the competent authority terminating the services of the appellant is neither stigmatic nor punitive and thus there was no requirement to hold an inquiry before terminating the services of the appellant while still on probation. Learned counsel placed reliance upon the decision of the Supreme Court reported as AIR 1999 SC 983 *Dipti Prakash Banerjee v. Satvendra Nath Bose National Centre*

for Basic SC, Calcutta and the decision of a Division Bench of this Court reported as 186 (2012) DLT 174 *Union of India & Anr. v. Pravesh Malik*.

7. The issue of termination of probationers has cropped up time and again. It has received judicial attention over four decades. Tests have been evolved, found to be difficult to apply; they have been reformulated from time to time.

8. Till date no test has been devised where a person's capacity, integrity, suitability, utility and capacity to work in harmony with the others can be tested at one go. Therefore, law vests a right in the employer, to keep under the watch the services of the person he has employed, but for a specified duration of time. This is to guard against errors of human judgment in selecting a suitable candidate. The employee remains on test for a specified duration i.e. the period of probation before he gets a right to be permanently absorbed. This period of probation affords to the employer locus to watch the efficiency, ability, integrity, sincerity, suitability and the competence of the probationer employee. This is the period of reassurance for the employer to reassure that his initial judgment was right. Therefore, an employer has a legal right to dispense with the services of the employee without anything more, during or at the end of the prescribed period, which is styled as the period of probation.

9. In the light of the aforesaid concept of probation as understood under Service Jurisprudence, termination of the services of the probationer, during or at the end of the period of probation does not affect any right of his, as indeed he has no right to continue to hold the post, save and except after confirmation.

10. However, where a probationer is stigmatized, evil consequences flow. He has to live with the stigma all his life. This stigma would affect

his future prospects of finding suitable employment elsewhere. Therefore, harmonizing the right of the employer and the right of the employee the service jurisprudence has recognized that where the termination of services of a probationer visits him with a stigma or is penal or mala fide, the probationer would have a right to justify that the cause which has resulted in his being removed is other than relating to his personal capacity, suitability, utility or capacity to work.

11. When is the order of termination of services of probationer discharge simplicitor and when is it punitive?

12. To find an answer to the above question we look at the judicial precedents on the point.

13. The first decision on the point is the decision of the Constitutional Bench of the Supreme Court reported as AIR 1958 SC 826 *Purshottam Lal Dhingra v Union of India* wherein it was held that where under the contract or Rules the government has a right to terminate the services of a probationer at any time, the termination of services of the probationer, in the manner provided in the contract or Rules, would not attract the provisions of Article 311(2) of the Constitution of India. In such cases, the motive operating on the mind of the government while terminating the services of the probationer is wholly irrelevant was the law declared. However, where the government had terminated the services of the probationer to penalize him for misconduct, negligence or any like reason, the requirements of the provisions of Article 311(2) must be complied with. It was further held that it is not the form of the termination order but the substance thereof which would determine whether it is penal and that, in an appropriate case, the Court can tear the veil behind a termination order which is innocuous on its face and is a discharge simplicitor.

14. Next came the decision of the Constitutional Bench reported as AIR 1960 SC 689 *State of Bihar v Gopi Kishore Prasad* wherein following 5 propositions were laid down regarding termination of the services of a probationer:-

> *"1. Appointment to a post on probation gives to the person so appointed no right to the post and his service may be terminated, without taking recourse to the proceedings laid down in the relevant rules for dismissing a public servant, or removing him from service.*
>
> *2. The termination of employment of a person holding a post on probation without any enquiry whatsoever cannot be said to deprive him of any right to a post and is therefore, no punishment.*
>
> *3. But, if instead of terminating such a person's service without any enquiry, the employer chooses to hold an enquiry into his alleged misconduct, or inefficiency or for some similar reason, the termination of service is by way of punishment, because it puts a stigma on his competence and thus affects his future career. In such a case, he is entitled to the protection of Article 311(2) of the Constitution.*
>
> *4. In the last mentioned case, if the probationer is discharged on any one of those grounds without a proper enquiry and without his getting a reasonable opportunity of showing cause against his discharge, it will amount to a removal from service within the meaning of Article 311(2) of the Constitution and will, therefore, be liable to be struck down.*
>
> *5. But, if the employer simply terminates the services of the probationer without holding an enquiry and without giving him a reasonable chance of showing cause against his removal from service, the probationary civil servant can have no cause of action, even though the real motive behind the removal from service may have been that his employer thought him to be unsuitable for the post he was temporarily holding, on account of his misconduct, or inefficiency, or some such cause."*

15. Thereafter in the decision reported as 1961 (1) SCR 606 *State of Bihar v Ram Narayan Das* the 'inquiry test' laid down in *Gopi*'s case (supra) was given a new dimension. It was laid down that one should look into '*object or purpose of the inquiry*' and not hold the termination to be punitive merely because an inquiry was conducted before the issuance of termination order. Where the inquiry was conducted to ascertain whether the probationer is fit to be confirmed the termination order would not be punitive.

16. Then came the decision of the Supreme Court reported as (1964) 5 SCR 190 *Champaklal Chimanlal Shah v. Union of India* wherein it was held that a preliminary enquiry conducted by the employer to satisfy that there was reason to dispense with the services of the probationer would not attract the provisions of Article 311(2) of the Constitution of India.

17. After considering the decisions in *Purshottam Lal*'s case (supra), *Gopi Kishore*'s case (supra) and *Ram Narayan*'s case (supra), in the decision reported as AIR 1968 SC 1089 *State of Punjab v. Sukh Raj Bahadur* a three-Judge Bench of the Supreme Court culled out following propositions with regard to termination of services of a probationer:-

> *"On a conspectus of these cases, following propositions are clear:*
>
> *1. The services of a temporary servant or a probationer can be terminated under the rules of his employment and such termination without anything more would not attract the operation of Art. 311 of the Constitution.*
>
> *2. The circumstances preceding or attendant on the order of termination have to be examined in each case, the motive behind it immaterial.*
>
> *3. If the order visits the public servant with any evil consequences or casts an aspersion against his character or integrity, it must be considered to be one by way of punishment,*

no matter whether he was a mere probationer or a temporary servant.

4. An order of termination of service in unexceptionable form preceded by an enquiry launched by the superior authorities only to ascertain whether the public servant should be retained in service, does not attract the operation of Art. 311 of the Constitution.

5. If there be a full-scale departmental enquiry envisaged under Art. 311 i.e. an Enquiry Officer is appointed, a charge sheet submitted, explanation called for and considered, any order of termination of service made thereafter will attract the operation of the said article." (Emphasis Supplied)

18. We then note the decision of the Constitutional Bench reported as AIR 1974 SC 2192 *Shamsher Singh v. State of Punjab* wherein it was held that where the order of termination of services of a probationer is '*motivated*' by a misconduct, negligence, inefficiency or any other like disqualification, the same is not punitive. However, where the order terminating the services of a probationer is '*founded'* on misconduct, negligence, inefficiency or any other like disqualification, the same is punitive. It was further held that the motive behind the termination order is irrelevant for the reason motive inheres in the state of mind which is not discernible. On the other hand, if the order of termination is founded on misconduct it is objective and manifest.

19. In the decision reported as AIR 1980 SC 1896 *Gujarat Steel Tubes Ltd v Gujarat Steel Tubes Mazdoor Sabha* a three-Judge Bench of the Supreme Court dwelt upon the concepts of 'motive' and 'foundation' referred to in the earlier decisions of the Supreme Court in *Purshottam Lal Dhingra* and *Shamsher Singh*'s cases (supra) in the following terms:-

"The anatomy of a dismissal order is not a mystery, once we agree that that substance, not semblance, governs the decision. Legal criteria is not so slippery that verbal manipulations may

outwit the court. Broadly stated, the face is the index to the mind and an order fair on its face may be taken at its face value. But there is more to it than that, because sometimes words are designed to conceal deeds by linguistic engineering. So it is beyond dispute that the form of the order or the language in which it is couched is not conclusive. The court will lift the veil to see the true nature of the order. Many situations arise where courts have been puzzled because the manifest language of the termination order is unequivocal or misleading and dismissals have been dressed up as simple termination. And so, judges have dyed into distinctions between the motive and foundation of the order and a variety of other variations to discover the true effect of an order of termination. Rulings are a maze on this question but, in sum, the conclusion is clear. If two factors coexist, an inference of punishment is reasonable though not inevitable. What are they? If the severance of service is effected, the first condition is fulfilled and if the foundation or causa causans is the servant's misconduct the second is fulfilled. If the basis or foundation of the order of termination is clearly not turpitudinous or stigmatic or rooted in misconduct or visited with evil pecuniary effects, then the inference of dismissal stands negated and vice versa. These canons run right through the disciplinary branch of master and servant jurisprudence, both under Article 311 and in other cases including workmen under managements….

Masters and servants cannot be permitted to play hide and seek with the law of dismissals and the plain and proper criteria are not to be misdirected by terminological cover-ups or by appeal to psychic process but must be grounded on the substantive reason for the order, whether disclosed or undisclosed. The court will find out from other proceedings or documents connected with the formal order of termination what the true ground for termination is. If, thus scrutinize, the order has a punitive flavor in cause or consequence, it is dismissal. If it falls short of this test, it cannot be called a punishment. To put it slightly differently, a termination effected because the master is satisfied of the misconduct and of the consequent desirability of terminating the services of a delinquent servant, it is a dismissal, even if he had right in law to terminate with an innocent order under the standing order or otherwise. Whether, in such a case, the grounds are recorded in a different

proceeding from the formal order does not detract from its nature. Nor the fact that, after being satisfied of the guilt, the master abandons the enquiry and proceeds to terminate. Given an alleged misconduct and a live nexus between it and the termination of service the conclusion is dismissal even if full benefits as on simple termination, are given and non-injurious terminology is used. On the contrary, even if there is suspicion of misconduct the master may say that he does not wish to bother about it and may not go into his guilt but may feel like not keeping a man he is not happy with. He may not like to investigate nor take the risk of continuing a dubious servant. Then it is not dismissal but termination simplicitor, if no injurious record of reasons or punitive pecuniary cut-back on his full terminal benefits is found. For, in fact, misconduct is then not the moving factor in the discharge. We need not chase other hypothetical situations here. What is decisive is the plain reason for the discharge, not the strategy of a non-enquiry or clever avoidance of stigmatizing epithets. If the basis is not misconduct, the order is saved. (Emphasis Supplied)

20. In the decision reported as (1999) 3 SCC 60 *Dipti Prakash Banerjee v. Satvendra Nath Bose National Centre for Basic SC*, following 3 questions had arisen for consideration before the Supreme Court:-

"(i) In what circumstances, the termination of a probationer's services can be said to be founded on misconduct and in what circumstances could it be said that the allegations were only the motive?

(ii) When can an order of termination of a probationer be said to contain an express stigma?

(iii) Can the stigma be gathered by referring back to proceedings referred to in the order of termination?"

21. With respect to the question No.(i), the Court observed as under:-

"If findings were arrived at an inquiry as to misconduct, behind the back of the officer or without a regular departmental enquiry, the simple order of termination is to be treated as 'founded' on the allegations will be bad. But if the inquiry was not held, no findings were arrived at and the employer was not

inclined to conduct an inquiry but, at the same time, he did not want to continue the employee against whom there were complaints, it would only be a case of motive and the order would not be bad. Similar is the position if the employer did not want to inquire into the truth of the allegations because of delay in regular departmental proceedings or he was doubtful about securing adequate evidence. In such a circumstance, the allegations would be a motive and not the foundation and the simple order of termination would be valid."

22. With respect to the question No.(ii), the Court observed as under:-

"Thus, it depends on the facts and circumstances of each case and the language or words employed in the order of termination of the probationer to judge whether the words employed amounts to stigma or not."

23. With respect to the question No.(iii), the Court observed as under:-

"On this point, therefore, we hold that the words amounting to "stigma" need not be contained in the order of termination but may also be contained in an order or proceeding referred to in the order of termination or in an annexure thereto and would vitiate the order of termination."

24. We then note the decision of the Supreme Court reported as (2002) 1 SCC 520 *Pavanendra Narayan Verma v. Sanjay Gandhi PGI of Medical Sciences* wherein the Supreme Court summarized the law relating to the termination of services of a probationer as follows:-

"One of the judicially evolved tests to determine whether in substance an order of termination is punitive is to see whether prior to the termination there was (a) a full scale formal enquiry (b) into allegations involving moral turpitude or misconduct (c) which culminated in a finding of guilt. If all three factors are present the termination has been held to be punitive irrespective of the form of termination. Conversely if any of the three factors is missing, the termination has been upheld.

.....

> ….*Therefore, whenever a probationer challenges his termination the courts first task will be to apply the test of stigma or the form test. If the order survives this examination the substance of the termination will have to be found out.*
>
> *Before considering the facts of the case before us one further, seemingly intractable, area relating to the first test needs to cleared viz. what language in a termination order would amount to a stigma? Generally speaking when a probationer's appointment is terminated it means that the probationer is unfit for the job, whether by reason of misconduct or ineptitude whatever the language used in the termination order may be. Although strictly speaking, the stigma is implicit in the termination, a simple termination is not stigmatic. A termination order which explicitly states what is implicit in every order of termination of a probationer's appointment, is also not stigmatic." (Emphasis Supplied)*

25. Lastly, we note the decision of a three-Judge Bench of the Supreme Court reported as (2005) 5 SCC 569 *State of Punjab v Sukhwinder Singh* wherein the ratio of law laid down by the Supreme Court in *Ram Narayan*'s case (supra) that where the inquiry was conducted by the employer to ascertain whether the probationer is fit to be confirmed the termination order would not be punitive was reiterated.

26. From the aforesaid decisions, we can safely conclude that the legal position which emerges is that the where an inquiry is conducted into an alleged misconduct committed by the probationer behind his back and a simple order of termination is passed '*founded*' on the report of the inquiry indicting the probationer, the action of termination of services of probationer would be tainted. But where no findings are arrived at any inquiry or no inquiry is held but the employer chooses to discontinue the services of an employee against whom complaints are received it would be

a case of the complaints '*motivating*' the action of termination of services of probationer and hence would not be tainted.

27. To illustrate, let us take a hypothetical situation. A and B are working as Head Cashier and Junior Cashier respectively in a bank. Whereas A is the permanent employee of the bank, B is a probationer. The chest of the bank has 2 locks numbered X and Y. Whereas A is entrusted with the key of lock X and B is entrusted with the key of lock Y. The purpose is that the chest could be opened after both locks X and Y are unlocked and since cash is kept in the chest, A and B would have to jointly open the chest and each would be a guard against the other. On a given day some money is found missing from the chest. An inquiry conducted reveals that A and B used to entrust their respective key to each other when one would leave the precincts of the bank for some personal work. Nobody's guilt is determined, and as a matter of fact the fact finding inquiry is not intended to determine anybody's guilt. Services of B are terminated by the bank. It would be a case where the termination based on the inquiry would be '*motivated*' on the inquiry report and not '*founded*' thereon. There is no aspersion cast upon B and the termination would be immune from challenge. But if the inquiry held is to find out who misappropriated the money and a definite finding is arrived at that B misappropriated the money and holding him to be a corrupt man, services of B are terminated, it would be a case where termination is '*founded*' on the inquiry and would be vitiated in law.

28. In the instant case the department has not even held a fact finding inquiry concerning the report submitted by the checking staff, which along with the report had submitted to the competent authority the two used tickets, one of which was sold by the appellant to a passenger and the other was still retained by him. It thus cannot be said that the department took

action against the appellant by way of penalty. It cannot also be said that the action is founded on a wrong. It would be a case where the action would be said to be motivated on the act of the appellant.

29. Concurring with the view taken by the learned Single Judge we dismiss the appeal but without any order as to costs.

(PRADEEP NANDRAJOG)
JUDGE

(PRATIBHA RANI)
JUDGE

FEBRUARY 02, 2015
mamta